

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 8, 2009

IN RE E.M.S.

**Appeal from the Juvenile Court for Rutherford County
No. TC895 Donna Scott Davenport, Judge**

No. M2009-00267-COA-R3-PT - Filed August 27, 2009

Mother challenges the trial court's termination of her parental rights on the grounds of abandonment by an incarcerated person and persistence of conditions. Finding that the trial court's decision was supported by clear and convincing evidence, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Mitchell J. Ferguson, Murfreesboro, Tennessee, for the appellant, V.S.C.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Joshua Davis Baker, Assistant Attorney General, Nashville, Tennessee, for the appellee, the Tennessee Department of Children's Services.

OPINION

I. Procedural and Factual History

On August 15, 2006, the Tennessee Bureau of Investigation and other governmental agencies made over 150 arrests in connection with a heroin drug operation located in several states, including Tennessee; among those arrested in Tennessee was V.S.C.¹ ("Mother"), who was placed in federal custody where she remained during the pendency of this matter in the trial court.² On August 16, 2006, the Department of Children's Services ("DCS") placed Mother's child³ into emergency

¹ To protect the identity of the child, the parents' initials will be used in this opinion.

² Mother is a Mexican national who was living illegally in the United States.

³ The child was born on February 6, 2006.

protective custody pursuant to an order of the Rutherford County Juvenile Court. On November 14, 2006, the trial court entered an order adjudicating the child dependent and neglected, placing him into foster care, and adopting a permanency plan, which listed the goal of DCS to have the child exit custody to live with relatives and/or adoption.

After efforts to place the child with relatives had failed, DCS filed a Petition for Termination of Parental Rights (“Petition”) on February 29, 2008, seeking to terminate both Mother’s and the child’s father’s, M.M.S. (“Father”), parental rights.⁴ The Petition sought termination on the ground of persistence of conditions and was amended to include the ground of abandonment by incarcerated parent.⁵ On June 5, 2008, the court found it was in the best interest of the child to cease visitation with Mother, due to the child’s medical needs⁶ and Mother’s incarceration.

On December 8, 2008, Mother pled guilty to conspiracy to distribute and possess with the intent to distribute one kilogram or more of heroin and received a sentence of time served and deportation back to her home country of Mexico. On December 9, 2008, a termination hearing was held at the detention facility where Mother was in custody.⁷ In an order dated January 5, 2009, the trial court found that Mother’s rights should be terminated on the grounds of “Abandonment by Incarcerated Parent...for Conduct Prior to Incarceration That Exhibits A Wanton Disregard” and “Persistence of Conditions” and because “Termination of Parental Rights [wa]s in the Child’s Best Interest.”⁸ Pursuant to her criminal plea agreement, Mother has been deported to Mexico and is currently residing there. Mother asserts the following issues on appeal:

1. Whether the trial court’s ruling that Mother’s parental rights should be terminated was supported by clear and convincing evidence.
2. Whether the trial court erred in concluding, by clear and convincing evidence, that termination of Mother’s parental rights was in the best interest of the child.

⁴ At the time, Father was in federal custody in Kentucky on drug charges. Mother and Father were not married at the time of the child’s birth.

⁵ The amended Petition also added as a ground “Failure to Establish/Exercise Paternity,” which applied only to the termination of Father’s parental rights and is not at issue in this appeal.

⁶ The child suffered from a birth defect called hemifacial microsomia, which causes craniofacial abnormalities and developmental delays. The child was being treated by specialists at Vanderbilt Children’s Hospital.

⁷ The hearing to terminate Mother’s and Father’s parental rights was bifurcated since Mother was in custody in Nashville, Tennessee, and Father was in custody in Kentucky.

⁸ Father’s parental rights were terminated at a subsequent hearing and his appeal is currently pending in this Court.

II. Standard of Review

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Our termination statutes identify “those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child’s best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent’s rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.* at 653.

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

III. Analysis

A. Abandonment by Incarcerated Person

A parent’s rights may be terminated on the ground of abandonment. Tenn. Code Ann. § 36-1-113(g)(1). The statute defines abandonment, in relevant part, as follows:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has

willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or *the parent or guardian has engaged in conduct prior to incarceration that exhibits wanton disregard for the welfare of the child.*

Tenn. Code Ann. § 36-1-102(1)(A)(iv) (emphasis added).

This court has stated that Tenn. Code Ann. § 36-1-102(1)(A)(iv) “reflects the commonsense notion that parental incarceration is a strong indicator that there may be other problems in the home that threaten the welfare of the child.” *In re Audrey S.*, 182 S.W.3d 838, 866 (Tenn. Ct. App. 2005). Ultimately, “[a] parent’s decision to engage in conduct that carries with it the risk of incarceration is itself indicative that the parent may not be fit to care for the child.” *Id.* But the second test for abandonment under Tenn. Code Ann. § 36-1-102(1)(A)(iv) does not make incarceration alone a ground for abandonment. Under the second part of the test, an incarcerated or recently incarcerated parent can be found guilty of abandonment “only if the court finds, by clear and convincing evidence, that the parent’s pre-incarceration conduct displayed a wanton disregard for the welfare of the child.” *Id.* Accordingly, a parent’s incarceration serves “as a triggering mechanism that allows the court to take a closer look at the child’s situation to determine whether the parental behavior that resulted in incarceration is part of a broader pattern of conduct that renders the parent unfit or poses a risk of substantial harm to the welfare of the child.” *Id.*

The pre-incarceration conduct referred to in Tenn. Code Ann. § 36-1-102(1)(A)(iv) is *not* limited to acts during the four-month period immediately preceding the incarceration. *In re Jeremiah T.*, 2009 WL 1162860, at *8 (Tenn. Ct. App. Apr. 30, 2009) (no Tenn. R. App. P. 11 application filed) (citing *In re Audrey S.*, 182 S.W.3d at 871). It is well established that probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the child’s welfare. *In re Audrey S.* 182 S.W.3d at 868 (citing *State Dep’t of Children’s Servs. v. J.M.F.*, 2005 WL 94465, at *7-8 (Tenn. Ct. App. Jan. 11, 2005) (perm. app. denied Tenn. Mar. 21, 2005); *In re C. LaC.*, 2004 WL 533937, at *7 (Tenn. Ct. App. Mar. 17, 2004) (no Tenn. R. App. P. 11 application filed); *In re C.T.S.*, 156 S.W.3d 18, 25 (Tenn. Ct. App. 2004); *In re C.W.W.*, 37 S.W.3d 467, 474-75 (Tenn. Ct. App. 2000)).

In its order terminating Mother’s parental rights, the trial court found:

[Mother] was arrested on the day of removal of [the child] in 2006, and was continuously incarcerated until the present day hearing on December 9, 2008. The petition for termination of her parental rights was filed on February 29, 2008. She was therefore incarcerated at the time of the filing of this petition. Prior to her incarceration, [Mother] exhibited a pattern of wanton disregard by participating in a multi-state heroin distribution organization, that also involved at least eleven states. This conduct not only subjected herself to investigation, arrest and incarceration by

federal authorities, but also caused the absence of possible relative placements for the child after her arrest.

This was not an isolated instance of crime, but a widespread ongoing criminal enterprise, which required criminal intent, willfulness and activity over a long period of time, thus putting the child at substantial risk of being left without a legal caretaker. She also conspired to kidnap her child from DCS custody after her incarceration, which showed an additional wanton disregard for the law.

This finding was fully supported by the testimony of Dennis Mabry, a DEA task force officer with the Tennessee Bureau of Investigation, who testified as to Mother's involvement in the drug operation.⁹ While Mother asserts that the "trial court erred in finding by clear and convincing evidence that [she] abandoned her child by while [sic] being incarcerated and while not having the ability to care for, nurture and support her child due to her incarceration," the trial court found "by clear and convincing evidence that [Mother] ha[d] abandoned her child by *engaging in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child.*" (Emphasis added). The record reveals that Mother was incarcerated as a result of the drug operation, *In re Audrey S.* 182 S.W.3d at 866, and she admitted to engaging in pre-incarceration criminal activity. *In re Audrey S.* 182 S.W.3d at 868. We find that the evidence preponderates in favor of the trial court's factual findings and that those findings clearly and convincingly support the trial court's finding of abandonment.

B. Persistence of Conditions

Tenn. Code Ann. § 36-1-113(g)(3) sets forth the following ground for terminating a parent's parental rights:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and: (A) The conditions which led to the child's

⁹ At the hearing, counsel for DCS asked Mr. Mabry about his investigation of Mother and the drug operation and he stated as follows:

Q. And how did you become involved or know of [Mother]?

A. In the year 2005, I began an investigation with several agencies in Middle Tennessee, investigating heroin distribution organization, and [Mother] was inside that investigation.

Q. And was that investigation confined to this state?

A. No, ma'am, it was not. It was a multi-jurisdictional, across the country investigation which led to - - began in the Middle District of Tennessee here in Nashville and developed into an eleven state, seventeen city investigation, and the investigation had a nationwide takedown on August 15, 2006.

Q. In the context of your investigation, did the parents make certain admissions as to their involvement in this activity?

A. Up to this point, [Mother] did plead guilty and has been sentenced in Federal Court.

Q. Did she admit to any particular drug activity herself?

A. She did. In her plea agreement in Federal Court, she did, yes.

removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist; (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

A termination proceeding based on the persistence of conditions ground requires a finding by clear and convincing evidence of all three statutory factors. *In re Valentine*, 79 S.W.3d at 549.

In its order terminating Mother's parental rights, the trial court stated that:

It has been almost two and a half years since the Juvenile Court's Protective Custody Order to remove this child. He was removed because there was no legal caretaker who was willing, able and available to provide a home, due to the mother's incarceration, and the father's being wanted for arrest on federal drug charges. [Mother] was unavailable to provide a home for the child at that time.

The Court finds today that the mother is still unable to provide a home for the benefit of the child, due to her incarceration and her federal deportation hold. The mother is unavailable to walk out of this courtroom with her child today, and is still unavailable to create a safe environment and home for this child.

Therefore, the conditions that led to the removal still persist, and the mother and [Father] are both still unavailable to provide a stable safe environment for the benefit of the child. Prolonging the parent-child relationship would diminish the child's chances of early integration into a safe and stable home.

Despite reasonable efforts by [DCS] to identify and investigate another relative placement for this child, both the mother and [Father] have been noticeably absent from the child's life for the vast majority of the child's life. It is clear that the same situation that led to the child's placement in foster care still persists.

Mother asserts that the trial court erred in finding that the conditions which led to the child's removal persisted because "[n]o speculation existed about her future at the time of the termination hearing" since it was known that she would be released from custody and deported back to Mexico and because she "ha[d] not been able to visit or otherwise been presented with an opportunity to care for her child." Mother, however, cites no evidence in support of her assertion that the trial court erred in finding that the conditions which resulted in the removal of her child persisted. Upon a review of the record, we find that the evidence preponderates in favor of the trial court's factual findings regarding the conditions which led to the removal of Mother's child and that those findings clearly and convincingly support the trial court's finding that the conditions persisted at trial.

C. Best Interest of the Child

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent's rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors for the courts to follow in determining the child's best interest at Tenn. Code Ann. § 36-1-113(i). The list of factors set forth in the statute is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. *See In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006) (citing *State of Tennessee Dep't of Children's Servs. v. T.S.W.*, 2002 WL 970434, at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, 2006 WL 3077510, at *4 (Tenn. Ct. App. Oct. 31, 2006)).

In her brief, Mother asserts that the court should never have reached the best interest analysis because "the grounds for the termination of her parental rights had never been satisfied" but contended that, "[i]n any instance,...termination of her parental rights is clearly contrary to the best interest of [the] minor child." In support of her assertion, however, Mother makes no argument on the merits of the claim, refers to no evidence, and fails to cite to any authority.

A party's failure to properly argue an issue in accordance with Rule 27, Tenn. R. App. P.,¹⁰ was discussed by this Court in *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000), which stated that:

Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue. Moreover, an issue is waived where it is simply raised without any argument regarding its merits. . . [P]arties cannot expect this court to do its work for them. This Court is under no duty to verify unsupported allegations in the party's brief, or for that matter consider issues raised but not argued in the brief.

Bean, 40 S.W.3d at 55-56.

Since Mother has failed to sufficiently argue this issue, her challenge to the trial court's finding that termination of parental rights was in the child's best interest is waived. Nevertheless, we have reviewed the record and find that the facts in support of the trial court's finding that

¹⁰ Rule 27(a), Tenn. R. App. P., states, in part pertinent, that:

(a) **Brief of the Appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on.

termination was in the best interest of the child, set forth in detail in the trial court's order, are fully supported by the evidence and record.

V. Conclusion

For the reasons set forth above, the decision of the Circuit Court is AFFIRMED. Costs are assessed against Mother, for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE